

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

COURT OF APPEALS
DISTRICT OF COLUMBIA
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Henry W. Wade
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IN THE

Court of Appeals, District of Columbia

OCTOBER TERM,

No. 3312

603

MARINE RAILWAY & COAL COMPANY, INC.,
APPELLANT,

vs.

UNITED STATES OF AMERICA, APPELLEE.

REPLY BRIEF OF APPELLANT.

JAMES R. CATON,

Counsel for Appellant.

PRESS OF HARRY W. WADE, ALEXANDRIA, VA.

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REPLY BRIEF OF APPELLANT.

Wherein consider the contentions of the Appellee under the several titles or heads designated in his brief.

PART ONE. (Page 12)

Jurisdiction, depends upon the fact whether the land in dispute is in the District of Columbia, or in the State of Virginia. That fact must be settled by the facts in the record and the law of the instant case.

The United States, has come into a Court of Law by an action of ejectment to recover the parcel of land to which it claims title, and the burden is upon it to show both jurisdiction and ownership, if both of these facts are traversed by the pleadings, which is the case here. In this the United States stands in no better position than a private suitor.

It is true, as contended by Counsel for Appellee, that the Court take judicial notice of the boundaries of the territory within which it exercises its jurisdiction, but this is merely a rule of evidence, that excuses the United States from proving the limits of that jurisdiction, unless that fact is traversed by the pleadings.

But when the territorial limits of the jurisdiction of the Court are traversed by a plea to the jurisdiction, and the United States joins issue on that plea, the rule of judicial

notice ceases to apply, and the Plaintiff is put to proof of the fact. This is fundamental in pleading and hardly needs citation of authority to support it. *Chase vs. Wetzler*, 225th U. S., pp. 79-89. *Roberts vs. Lewis*, 144th U. S., pp. 653-658. Law Ed. Vol. 36, p. 579.

The question of jurisdiction, it is true, as contended by Counsel for the Appellee, is no longer an open question in the cases decided by the Courts of the District of Columbia, as between the same parties, as to the same subject matter, and upon the same state of facts, because as to them, it is *res judicata*. But as between other parties, under a different state of facts, and as to a different subject matter, such is not the case. The cases referred to in the Appellee's brief, may be analogous and as authority are persuasive, but not necessarily conclusive, and by so much the question is still open.

The same rule applies as to Section One of the Revised Statutes of the United States, approved June 22nd, 1874, defining the boundaries of the District of Columbia. This is the only Act upon that subject cited on behalf of the Appellee, in which Congress has made any special definition of the territorial boundaries of the District of Columbia.

This Act is not conclusive of the boundaries of the District, it is but a mere assertion of the fact, and unaccompanied by acts showing in fact, that such is the boundary of the District of Columbia, is not conclusive. The distinguished Counsel for the Government, claims for this Act everything, which in his brief he denies to the Appellant, with reference to the numerous Acts of the Colony and the State of Virginia, covering a period of over two hundred and forty-three years, accompanied by conduct showing physical possession and claim of the territory, which he now insists is a part of the District of Columbia. The Howsing Grant of 1669, the legislation of the Colony and State of Virginia from 1753 to 1789, and from 1846 to 1912, the making of land by Virginia and her citizens into the Potomac river all along the Alexandria riverfront, covering a distance of two blocks east of the shore line of 1748, exclusive of streets, including fourteen City blocks, exclusive of streets, and constituting an area of about thirty-five acres of land, are facts wholly ignored in his contention here.

Although the Act of 1874, is a political declaration of the boundaries of the District of Columbia, yet when the United States comes into a Court of Law and sues to recover the fee of a parcel of land claimed by it to be within the boundaries of the District, and that fact being put in issue by a plea to the jurisdiction, in which the United States joins issue with the Plaintiff, the United States then undertakes and is bound to establish that fact, and the case must be tried on the law and the facts of the instant case.

The Counsel for the Appellee lays much stress upon the Act of Congress of June 22nd, 1874, as defining the boundaries of the District of Columbia, and insists that this Act fixes the southern boundary of the District at high water mark on the Virginia shore of the river Potomac, and to give emphasis to his contention, he has italicized these words in the Act: "including the river Potomac in its course through the District", which occurs in the last sentence of the Section. We submit, however, that neither the language of the whole Section or the words in italics, justify any such construction, and hold, that the Section in itself, and the authorities interpreting the terms employed, convey an entirely different meaning, a meaning wholly consistent with the Appellant's contention here as to the legal effect of the Howsing grant, the compact of 1785, the arbitration of 1878, the Act of Congress of 1789, consenting thereto, and the general rule of law relating to title and boundaries established by prescription as between sovereignties.

Take the full text of the Section which is as follows: "The District of Columbia is that portion of the territory of the United States ceded by the State of Maryland for the permanent seat of government to the United States, including the river Potomac in its course through the District, and the islands therein."

It will be noticed that the terms of this Section do not include the river Potomac to high water mark on the Virginia shore as the southern boundary of the District, but distinctly fix the course of the river as the southern boundary of the District. This Section must be construed by the generally accepted meaning of the terms employed. The course of a river has a definite meaning, and refers only to

the direction of motion of the main body of water, or its main thread, or that portion of the stream moving on a line parallel to its banks, which, in its normal state, is ever flowing onward and outward to the ocean, and necessarily excludes its lateral waters that merely wash the fringes of the shore, and as well, excludes therefrom the small bays, inlets, creeks, coves and indentations constituting the meander lines of its shore.

Attorney General *vs.* Hudson River R. R. Co., 9th New Jersey, Equity Rep. p. 526, etc.

Jeffries *vs.* Omaha Land Co., 134 U. S., p. 178.

Mitchell *vs.* Smale, 140 U. S., p. 406.

Hardin *vs.* Jordan, 140 U. S., p. 371.

St. P. & Pac. R. R. *vs.* Shurmeier, 7th Wall., 272-290.

Lowndes *vs.* Town of Huntington, 153 U. S., 1-32.

An inlet, cove, creek or bay is a recess in the shore of a river and not a separate or independent stream, though sometimes used in the latter meaning.

Black's Law Dictionary, page 300.

CYC. Vol. 12, p. 66, CYC. Vol. 11, page 1021.

The "course of a river" is a line parallel with its banks. The "current of the stream" will vary from the general course of the river, depending upon a variety of circumstances. Short bends in the river will drive the current diagonally from one bank to the opposite bank. Exposure to the winds on one side, and the protection of high banks on the other, will produce the same result.

Attorney General *vs.* Hudson River R. R. Co., 9th New Jersey Equity, 526, etc.

Battery Cove which includes the land in controversy is no part of the course or of the navigable body of the river Potomac, and the Act of Congress referred to negatives the Appellee's interpretation thereof, when considered in the light of the authorities and of the facts in the record.

It is clearly shown by Exhibit "5", Government plan of the improvement of the river Potomac at Alexandria, and

House Document, No. 1253, accompanying the same, page 173 to 182, inclusive, of record, all of which are made a part of the Act of Congress of June 25th, 1910, that no part of the filled area of Battery Cove, had previous to said fill, at ~~high~~ water mark or ~~high~~ tide, a greater depth than two feet, and this only in one place near the extreme end of Jones' Point, the residue of the area had an average depth at ~~high~~ tide of less than one and five-tenths feet, which is conclusive of the fact that at no time was said cove a part of the course or the navigable portion of the river.

FIRST POINT.

(Page 17)

There is no mistake of fact as contended by Counsel for the Government, in the Appellant's claim that the Howsing Grant was prior in date and effect to the Culpeper grant. The Howsing Grant was made October 21st, 1669, and the Culpeper Grant was made September 4th, 1688, or nineteen years later. The contention of Counsel for the Appellee, that the Howsing Grant is subordinate to the Culpeper Grant, and that in fact Howsing derived title from the Culpeper Grant, because of the grants of Charles II to Hopton and others, of September 18th, 1660, and to the Earl of St. Albans and others, of May 8th, 1680, is not historically accurate. The Hopton Grant was surrendered and cancelled, and Charles II, on May 8th, 1680, subsequent to the Howsing Grant eleven years, made the grant to the Earl of St. Albans which contained the express proviso, that said patent nor anything therein contained, should extend or be construed to infringe, to make void or otherwise prejudice any contract or contracts, grant or grants whatsoever, theretofore made or granted by the Governor and Council of Virginia, unto any planters or other inhabitants, in the actual possession thereof, by virtue of any such grant made before September of the thirteenth year of his reign, which was September, 1773, or four years after the Howsing Grant. The St. Albans grant contained a further proviso, that such grant was limited to twenty years, unless the grantee should procure the lands to be settled, etc.

Revised Code of Virginia, 1819, Vol. I, pp. 343-350.
Hunter vs. Fairfax, 7th Cranch, 603.

The record here shows that Howsing and those claiming under him, have been in possession under his grant since October, 1669.

The grant of James II to Lord Culpeper was not made until September 4th, 1688, or nineteen years after the Howsing Grant, and it is to be noted, that the Howsing grant was a grant in fee, and contained no reservation of rents whatsoever, and that its location was determined before the grant was made, as appears from the grant itself, wherein its location and boundaries are particularly set forth.

As to the suggestion made by Counsel for the Appellee, that it is elementary history, that the charters of 1606, 1609, 1611 and 1612 had been revoked we have to say, it is true that the charter of 1609 was revoked by the judgment of the King's Bench, in 1623; and that it is also historically true, that the English colony in Virginia had its foundation and beginning under the several charters of James I, and that a colonial government, subservient to the Crown of England, was established under them as early as 1619; and that from the period of said revocation of 1623, Virginia was considered and treated in England, and in this country, as a Royal Colony; and that all grants of land in the Colony of Virginia, from 1623 and subsequent thereto, emanated from the Crown. It is likewise true historically, that the boundaries of the Culpeper grant were unknown and unascertained until sixty-seven years after the Howsing grant.

Hite *vs.* Fairfax, 4 Call, Va. p. 42 &c.

It was not until after 1736 the boundaries of the Culpeper grant were known. It is likewise an historical fact that Lord Fairfax, successor in title to the Culpeper grant, after 1738, voluntarily petitioned the Crown to confirm all grants within the boundaries of the Northern Neck made by the Crown under the colonial government of Virginia, so that the lines of the Culpeper grant might be clearly ascertained; and that because of this petition, the Crown did confirm those grants, and the Act of 1748 of the House of Burgesses of the Colony of Virginia, referred to in the record and the briefs of Counsel, was adopted to settle finally any

controversies between Lord Fairfax and the grantees of the Crown through the Colony, within the Northern Neck.

Hite vs. Fairfax, 4 Call, Va. p. 42 Va.

SECOND POINT.

(Page 22).

Referring to the Howsing grant, we beg to submit, that on the plea to the jurisdiction, this grant was introduced in evidence, to show that the Crown of England, by its duly constituted representative in the Colony of Virginia, in 1669, claimed by right of territorial ownership, sovereignty and jurisdiction, the power to make that grant, including the islands in the river Potomac and the soil under the waters of the creeks and inlets within the lines of said grant; and that such claim has been acted on during all the intervening years, between 1669 up to the present, covering a period of two hundred and forty-three years, and without question until the year 1912; and that by reason thereof, said grant of the islands and the soil under the waters of the creeks and inlets within its boundaries, has by prescription, become incorporated within the territorial boundaries, sovereignty and jurisdiction of the State of Virginia. As appears by the record here, this prescriptive right had become established before the Maryland cession of 1788 to the United States, there having then elapsed one hundred and nineteen years between the date of said grant and the date of said cession.

The Appellee contends, that a grant of public lands, bounded by a navigable river, extends only to the shore line, or meanders of the shore of the river. We submit, notwithstanding, that such is not the general rule, and that the Supreme Court of the United States has held otherwise in the following cases:

Meander lines are run in surveying public lands bordering upon navigable rivers, not as boundaries of the tract, but to ascertain the quantity of the land subject to sale; and the watercourse, and not the meander line as actually run on the land, is the boundary.

Jeffries vs. Omaha Land Company, 134 U. S., 178.

Mitchell vs. Smale, 140 U. S., 406.

Hardin vs. Jordan, 140 U. S., 371.

St. P. & Pac. R. R. vs. Shurmeier, 7th Wall, 272-290.

In a grant of land situated on Long Island Sound, the term "the Sound" named as a boundary, means the body of water known by such name; and that term does not include waters, such as Huntington Bay, opening into or connected therewith, so as to exclude them from the grant.

Lowndes *vs.* Huntington, 153 U. S., 1.

Newsom *vs.* Prior, 7th Wheaton, p. 8.

The contention of Counsel for the Government that Alexander's Island and Pearson's Island, shown upon the plats Exhibits "9" and "16," of 1693 and 1741, as islands then existing in the river, were only islands in name and not in fact, and that the former was separated only from the mainland by a gut, and that the latter has become fast to the mainland, is not sustained by the record; and we beg to say in reply, that the learned Counsel is speaking of the present situation, and not of the situation disclosed by the record. If permitted to do so, I may say from personal recollections, both of these islands were separated from the mainland by the waters of the river Potomac. Alexander's Island was reached by a bridge and causeway from the Virginia mainland, and that the present situation has been brought about by artificial fills, by accretions and by freshets and like causes, and that the same is substantially true as to Pearson's Island; but these matters are *de hors* the record. The fact remains that Exhibits "9" and "16" show that both in 1693 and 1741, these islands were separated from the mainland.

Referring to the right of the Crown to make grants of the fee to the soil under the waters of navigable rivers, I have this to say: That there is ample evidence that the Crown exercised that right in this country and the authorities seem to sustain that right, subject, however, to the right of his subjects to the navigation of the rivers and the common of fishery. It is not contended that such a grant of the soil under the waters of a navigable river carries with it the right to so obstruct the river as to impair or destroy its natural uses, but that such a grant could, can and has been made along the shores of navigable rivers in this country, to secure the people owning lands bordering upon

such rivers in the enjoyment of its natural uses and benefits, subject, however, to the paramount right of navigation and the common of fishery.

Lowndes vs. Huntington, 153 U. S., 1.

Archer vs. Greenville, Sand & Gravel Co., 223 U. S., 60-70.

U. S. vs. Cress, 243 U. S., 316-362.

U. S. vs. Chandler-Dunbar Water Power Co., 229 U. S., 51.

Justice Lurton, who delivered the opinion in the last above cited case, says: "This title of the owner of fast lands upon the shore of a navigable river, to the bed of the river, is at best, a qualified one. It is a title which inheres in the ownership of the shore; and, unless reserved or excluded by implication, passes with it as a shadow follows the substance. It is subordinate to the public right of navigation and however helpful in protecting the owner against the acts of third parties, is of no avail against the exercise of the great and absolute power of Congress over the improvement of navigable rivers."

Lewis on Eminent Domain, Secs. 78-83 inc.

After the lapse of time between the date of the Howsing grant and the present, the presumption of law is in favor of the validity of that grant.

Fletcher vs. Fuller, 120 U. S., 534.

Carifio vs. Insular Govt. Philippine Is., 212 U. S., 449.

Costas vs. Insular Govt. Philippine Is., 221 U. S., 623.

CYC, Col. 32, page 1202.

Matthews vs. Burton, 17th Grat., 312.

It is a rule of law that an original grant carries with it constructive or legal possession of the whole area covered by the grant.

Dawson vs. Watkins, 2nd Robinson, Va., 259-268.

Green vs. Leiter, 8th Cranch, 229.

Green vs. Watkins, 7th Wheaton, 27.

Howdashell vs. Crenning, 103 Va., p. 30.

That possession under the Howsing grant of a part of the land comprehended within its boundaries, constitutes possession of the whole; especially is this true, where acts of possession and claim of ownership under said grant continued for a period of two hundred and forty-three years, and the exercise of territorial sovereignty and jurisdiction of the State of Virginia and the City of Alexandria, have continued for so long a period, and taxes have been imposed and collected thereon by both Virginia and the City of Alexandria during all that period, except the period between the cession and recession of the Virginia territory. All titles as shown by the records here, to property within the lines of the Howsing grant in Alexandria City and County, including Alexander's Island and Pearson's Island, and to the made lands on the Alexandria riverfront, which latter cover approximately fourteen City blocks, or about thirty-five acres of land, artificially made, east from Water or Lee Street, into the Potomac river, are derived from the Howsing grant, over all of which Virginia has continuously, notoriously and adversely exercised territorial jurisdiction, sovereignty and control and collected taxes thereon, during said period.

Jackson *vs.* Camp, 1 Cowper, N. Y., 605-612.

This constructive possession has its origin in the maxim of the common law: "possession of a part shall be construed as possession of the whole."

Garrett *vs.* Ramsey, 26th W. Va., 345-351.

Lowndes *vs.* Huntington, 153 U. S., 1-32.

The distinguished Counsel for the Government, on page 32 of his brief, impliedly at least, admits that the land on the riverfront, made by the citizens of Virginia, has now ripened into a good title, and is within the territorial boundaries, sovereignty and jurisdiction of Virginia.

Lord Baltimore, the Colony and State of Maryland, and the United States, were bound to take notice of any adverse claim to his or their territory, and as well, the occupation of any portion thereof, and to act in respect thereof, and their failure to do so, upon the facts set forth in this record.

and for the space of time therein shown or for the prescriptive period, worked a change in the boundary line under consideration, by virtue of the doctrine of prescription, and that, notwithstanding the original line of the Calvert grant.

THIRD POINT.

(Page 33).

Referring to territorial ownership of the Potomac river to high water mark on the Virginia side thereof, and how affected by the compact of 1785, we insist, that the Seventh paragraph of the compact of 1785, did cede substantial proprietary rights to the State of Virginia for the use and benefit of her citizens, viz: The right to the shores on the Virginia side of the Potomac, the right of access to the navigable part of the river, and to build bulkheads, wharves and piers into the river to the line of navigability, that her citizens might avail themselves of the natural uses of the river, subject to this restriction only: that the exercise of such rights should not interfere with the navigation of the river. To the full enjoyment of the rights granted by the compact of 1785, under the cession by Maryland to Virginia, there was necessarily vested in the State of Virginia territorial right, sovereignty and jurisdiction, as an incident to the enjoyment of such rights, otherwise paragraphs Six and Seven of the compact were meaningless.

If the contentions of the Appellee be correct, that Maryland, after the compact of 1785, retained territorial right, sovereignty and jurisdiction to high water mark on the Virginia side of the river, it would deprive the State of Virginia of the exercise of any territorial right, sovereignty or jurisdiction, to regulate the use and enjoyment of those rights by her citizens, and as well, to regulate the shipping within the harbor of Alexandria, and to make other proper regulations for the control of said harbor; and would leave the regulation of the enjoyment and use of such rights, by Virginia and her citizens, in the State of Maryland, and to that extent would nullify the compact and its very objects and purposes.

That the compact of 1785, was regarded by the contracting parties in the light of a boundary question and

agreement between them, is conclusively shown by the arbitration and compact between Virginia and Maryland, of 1878, and so regarded by Congress in its Act of 1879, because the Assemblies of both States, in 1878, ratified the finding and award of the arbitrators, fixing the boundary line therein set forth, as being the true boundary line between the said States agreeably to the compact of 1785, and Congress consented to this interpretation of the compact of 1785, by its Act of 1789.

That Maryland had the right to grant and did grant to Virginia, the fee in the soil under the River Potomac for the uses and purposes of extending wharves, etc., subject to the restrictions set forth in the Sixth and Seventh paragraphs of said compact, is sustained by the authorities cited in Appellant's brief and as well as by the following cases:

Donnelly vs. U. S., 228 U. S., 243-278.

Madison vs. Mayer, 40th L. R. A., 645 and note.

Hoboken vs. Penn. R. R., 124 U. S., 656-694.

Potomac Steamboat Co. vs. Upper Potomac Steamboat Co., 109 U. S., 672-702.

St. Paul & Pac. R. R. vs. Shurmeier, 7th Wall. 272-290.

In the case of the Potomac Steamboat Company *vs.* Upper Potomac Steamboat Company, above cited, Justice Matthews, in delivering the opinion of the Court, speaking of the interest of Notley Young in the riparian rights fronting on Water Street, in Washington, uses this significant language: "This denies no right that can be claimed by virtue of the compact between Virginia and Maryland of 1785, or that secured to their citizens the privilege of making and carrying out wharves, as to the shores of the Potomac only so far as they were adjoining their lands, and such had always been the law in Maryland, notwithstanding the Act of 1745, Chapter 9, Section 10, which was held to authorize the improvements therein spoken of, to be made by improvers in front of their own lots only. The 'full property in the shores of the Potomac river' spoken of in the compact, if it is not to be taken as a seizen of the land covered with water, but of right of occupation only, properly termed

a franchise, must be appurtenant to the land, the conveyance of which carries it as an incident; otherwise, if it implies an ownership in the soil of the shore, between high and low water marks, as land, it could not pass as an appurtenant, by deed conveying adjoining land; for land can not be appurtenant to land."

The dissenting opinion of the Chief Justice and Justices Miller and Gray, delivered by Justice Miller, contains these significant words: "When to this we add that no Act of Congress has ever asserted ownership of these wharves or landing places, or the rights of the riparian owner, while they have conferred on the authorities of the District the power of regulating wharves, private and public, we are forced to the conclusion, that these rights are left with the owner of the squares certified to Notley Young in the division of the United States."

The logic of the Appellee's contention here is, that the compact of 1785, vested no substantial or proprietary right either in the citizens of Virginia, as such, or in the State of Virginia, for the use of her citizens, and insists that the present boundary line between the District of Columbia and Alexandria City is the original line of the Calvert grant. If this contention be sustained, it would carry the District line to the original shore line on the Virginia side of the Potomac, to the high water line indicated on Exhibit "1," "plan of the town of Alexandria," and would result not only in cutting off from Alexandria about one-fourth of its river front represented in Battery Cove, but would result also, in cutting said City entirely off from access to the Potomac river, and include within the lines of the District, territory now in the City of Alexandria, which if we include Battery Cove, constitutes in all about thirty City blocks of land east of the original high water line of the Calvert grant, and would place that territory within the territorial sovereignty and jurisdiction of the District of Columbia. As appears by the record here, the area above mentioned is the location of all of Alexandria's principal railroad terminals, industrial plants and wholesale houses, to serve which the Acts of Congress of 1910 and 1911 were intended, as shown by House Document No. 1253.

Whatever rights Virginia has, under the compact of 1785, were still held and enjoyed by that State at the date of cession by Maryland to the United States in 1788, and necessarily such cession was made subject to the rights of Virginia under that compact, and what those rights were are clearly expressed in the language of Justice Matthews, already cited. Whether those rights were vested in the State of Virginia, for the benefit of her citizens, or in her citizens individually or collectively owning lands along the shores of the Potomac, is immaterial, because in either event they were within the territorial dominion, sovereignty and jurisdiction of Virginia. Maryland's cession of 1788, did not and could take them away, but they remained in Virginia until 1789, when that State made her cession to the United States, and by such cession either did or did not transfer them to the United States. At the time of Maryland's cession of 1788, the compact of 1785 was still in full force and effect and its provisions have never been abrogated by joint agreement between the two States.

If Virginia did not convey these rights to the United States, they were never vested in the United States, and therefore, remained in Virginia, at the time of the Act of re-cession. It will be noted, that the ceding clauses of both the act of cession and re-cession by and to Virginia, are substantially expressed in identical terms and language. It, then, the terms of re-cession were not sufficient to re-vest in Virginia all the rights she ceded to the United States in 1789, then it follows, as a necessary sequence, that the language of the cession from Virginia to the United States, was not sufficient to vest those rights in the United States.

Admit the compact of 1785 could have been revoked by the States, and that after the cession of both States to the United States, Congress could have done whatever the two States could have done, and thus have extinguished the rights secured by said compact to Virginia and her citizens. Yet the fact remains, that Congress never passed any act upon that question between the date of cession and re-cession of Virginia territory. If Congress never passed any Act abrogating the rights of Virginia or her citizens in the Potomac, under the compact of 1785, or any Act claiming the riparian rights in the Potomac river secured

by said compact to the citizens of Maryland and Virginia, respectively, then it necessarily follows that the rights of the citizens of the respective States in the shores were not extinguished but still remained in them until extinguished by some Act of Congress. It was clearly the opinion of Justice Miller in the Steamboat cases referred to and his co-dissenting Judges, that an Act of Congress was necessary to that end, or if, as Justice Matthews held, those rights were by the compact of 1785, made appurtenant to the Virginia territory, then by the Virginia cession, they passed to the United States as appurtenant to the territory ceded, and upon the re-cession, passed back to Virginia, as appurtenant to the territory re-ceded.

The decision in the case of the Mayor of Georgetown, etc. *vs.* The Alexandria Canal Company, reported 12th Peters, shows that the views expressed by Justice Miller as to the necessity for an Act of Congress to change or alter those rights, were entertained by the Court in the Canal Company case and distinctly asserted therein.

It is clear from the record in this case, that Congress never passed any Act before the date of re-cession to Virginia in any way revoking, altering or impairing the rights conferred upon the citizens of the respective States by the compact of 1785, and in so far as Virginia and her citizens were concerned, those rights remained in full force and effect at the date of re-cession, and by that Act passed back to Virginia as a part of the territorial sovereignty, jurisdiction and rights by her ceded.

FOURTH, FIFTH AND SIXTH POINTS

(Pages 66, 71, 75).

Thees points of contention by the Appellee relate to the arbitration, award and compact of 1878, between Maryland and Virginia, and the consent of Congress thereto, in 1879, and have been fully discussed in the Appellant's briefs, and have been referred to in the oral argument. The Appellee's brief, admits that the proviso in the Act of Congress of 1879, consenting to the arbitration, award and compact, related only to the subject matter thereof, and did not refer to any reservation as to the territory of the Dis-

trict of Columbia and in that both parties agree. We do insist, however, that Congress, by its Act of 1879, did admit that the boundary line fixed by the arbitration and award of 1878, was the true boundary line between the two States agreeably to the compact of 1785, and in so doing, conceded that the boundary line so fixed was the true boundary line between Virginia and Maryland, in 1785, and before any cession by either State of territory for the District of Columbia; and we contend, further, that the United States by virtue of said Act of Congress, became a party to the arbitration and award, by adoption and ratification, and was as much bound by it as if it had become a party at the inception of that proceeding by the States.

Wharton *vs.* Wise, 153 U. S., 155-156.

Virginia *vs.* Tennessee, 148 U. S., 503-521.

In the case of Maryland *vs.* West Virginia, 217 U. S., the Court said, in referring to the compact of 1785: "The privileges therein reserved to the citizens of the two States on the shores of the Potomac, are inconsistent with the claim that the Maryland boundary shall extend to high water mark."

SEVENTH POINT. (Page 78.)

To the contention of the Appellee as to the headland theory of boundary lines, in navigable rivers, we have only this to say: That whatever may have been the theory before that date or elsewhere, or in other jurisdictions, the fact remains in this case, that the headland rule adopted in the arbitration and award of 1878, was accepted and ratified by both of the States interested and consented to by Congress, and we submit, that these acts settle that question so far as this case is concerned.

The artificial headlands at Alexandria, do not materially affect the headland boundary established by said compact, because the original headlands are located on Exhibit "3", according to Engineer Gordon, by measurements shown on the Exhibit, which is accompanied by his statement to the effect that a line drawn from low water mark at Jones' Point to low water mark at Point Lumley, as it originally

stood, will include the retaining wall extending from Jones' Point to the shipyard of the Appellant, and all the made land in Battery Cove, including the land in dispute.

The facts in the record show, beyond question, that there were three distinct headlands projected into the Potomac river in front of Alexandria, in 1748, when the plan of the town was first laid off, and they were then known as Point West, Point Lumley and Jones' Point, and have ever since been known by those names. See pages 8, 9, 10 Printed Record. The original shore lines of the Potomac at Alexandria, in 1748, extended to Water Street, now Lee Street, in said City, in fact to the west side of said Street, between Point Lumley and Point West, and that from the original shore line of this cove, it will appear by actual measurements on Exhibit "3," of the length of squares and width of streets, that Point Lumley projected into the river east of the west side of Lee Street, between six and seven hundred feet and that the width of Union Street was fifty feet. It is also clearly shown by the record, that between Point Lumley and Jones' Point, the shore line of that cove, at the foot of Franklin Street, did not extend east of the west side of Union Street, and that all of the land east of the west side of Union Street, including the street, was made prior to 1785, and from these facts it also appears, by the same measurements above referred to, that Point Lumley, as it related to the last mentioned cove, in 1748, projected over three hundred feet into the Potomac river east of the west side of Union Street. Hence the contention of Counsel as to these headlands being of insufficient import to have a bearing on this case, is not sustained by the record.

EIGHT AND NINTH POINTS. (Pages 92 and 109).

Relating to the domestic statutes of Virginia, concerning the corporate boundaries of Alexandria.

The Appellant insists that all these numerous statutes followed the Howsing grant of 1669, and began to be enacted with the year 1753, and covered a period of one hundred and nineteen years before any cession to the United States of Virginia territory, and after the re-cession continued to be enacted and acted upon to the time of the in-

stitution of this suit; and that these Statutes coupled with the other facts in the record, show that Virginia by her declarations and Acts of her General Assembly, has consistently claimed and asserted title, possession, territorial sovereignty, dominion and jurisdiction over the lands and the waters and the soil under the waters of the Potomac river, from 1669 to the present time, within the lines of the Howsing grant, and that this claim has been open, notorious, continuous and adverse, and that there does not appear in the record anything to the contrary. While, on the other hand, the Appellee insists that the Act of Congress of 1874 is conclusive upon this Court as a political declaration by Congress, of the boundaries of the District of Columbia, and that such declaration settles this case; yet, this is the only Act, so far as the record here shows, and is unaccompanied by any evidence in the record showing one single claim of ownership in the land in dispute or of any part of Battery Cove, or one single instance of the exercise of territorial sovereignty and jurisdiction of any description whatsoever by the United States, in or over the said cove or the land in dispute, since 1846.

TENTH POINT. (Page 117).

The questions referred to under this paragraph of the Appellee's brief, have already been sufficiently discussed under other headings of said brief, and we will not repeat that discussion here.

ELEVENTH POINT. (Page 1119).

In discussing the previous points made in the Appellee's brief, we have already shown that the claim of the Appellant does not flow from the Culpeper grant, and that the Howsing grant of 1669 was adverse to it, and further discussion of that point here is unnecessary.

Under this title, however, the Appellee seems to depart from the question of jurisdiction and to enter upon a discussion of the doctrine of adversary possession of lands by an individual, as against the claim asserted by the United States. The Appellant, so far, has been discussing, among

other grounds of defense, on the plea to the jurisdiction, the acquisition by Virginia of territorial dominion, sovereignty and jurisdiction under the rule of prescription, as between sovereignties, arising by virtue of the Howsing grant and other facts and circumstances set forth in the record, which we have already discussed and simply refer to the authorities cited in the Appellant's original brief, which show that the doctrine of prescription, as between sovereignties, is well established, and will work a change of boundaries, if that claim is continued uninterrupted for a long period of years.

TWELFTH POINT. (Page 122).

Having already discussed the questions here presented by the Appellee, we are content to say, that the case of the Mayor etc. of Georgetown *vs.* Alexandria Canal Company, clearly holds that the rights secured to the citizens of Virginia under the compact of 1785, were not secured to the citizens as such, individually, but that the compact was between the two States, and that the citizens of both States were entitled to all the benefits conferred by that compact. In our view of this case, when considered on the plea to the jurisdiction, it is immaterial whether these rights were granted to the citizens as such, or were granted to the State for the use and benefit of her citizens. In either event, there was vested in Virginia territorial dominion, sovereignty and jurisdiction of those rights. They were a part of the territorial dominion, sovereignty, rights and jurisdiction, ceded by Virginia to the United States in 1789, and were included in the act of re-cession to Virginia, in 1846. But if, as contended by the Appellee, these rights constituted merely an easement in the Potomac river for either the citizens of Virginia as such, or in Virginia, for the use and benefit of her citizens, and could only pass back to Virginia, under the Act of re-cession, by express terms therein, to revive the easement, then the Appellee finds itself in this position,—a position wholly inconsistent and untenable, when you consider the language and terms of the Acts of cession and re-cession. It will be noted that the Act of Cession by Virginia and the Act of re-cession

by the United States to Virginia, in the terms or language of the ceding part of both Acts, are in substance identical. If then, the Act of re-cession was insufficient to re-cede to Virginia the easement she enjoyed under the compact of 1785, then it necessarily follows, that the act of cession by Virginia to the United States, never transferred the easement to the United States, because such act of cession did not contain express terms therein to transfer the easement to the United States, hence, the easement still remained in Virginia after the cession of 1789. At the time of the re-cession whatever easement existed in Virginia, or her citizens had not been extinguished and could not be extinguished, except by joint agreement between the State of Maryland and the State of Virginia. The Appellee concedes that all the Virginia land or territory, to the high water line, was re-ceded in 1846, to that State. That being true, it follows that Virginia, still possessing at that time the easement in the Potomac river, and not having parted with the same, was entitled to enter again into the enjoyment of it and did so enter into the enjoyment of it, and continued such enjoyment without question or protest, until the beginning of this suit.

THIRTEENTH AND FOURTEENTH POINTS.

(Pages 131 and 139).

This contention of the Appellee was not disputed, in so far as it relates to the power of the United States to build sea walls and other structures and to make fills behind them, for improving the navigation of the public navigable rivers, it is a question too well settled by authority to be doubted.

The Appellant does contend, however, that if the Government does not own the soil under the water covering the area filled, that it acquires no title to the land made by reason of any such improvement. The simple question here is, whether the land in dispute is within the territorial sovereignty and jurisdiction of the District of Columbia, or within the territorial sovereignty and jurisdiction of the State of Virginia, and that fact must be decided by the law and the facts of this case.

RELATING TO MAPS AND PLATS IN EVIDENCE.

The Counsel for the Appellee, on page 24 of his brief, states that the Howsing patent would not, under any circumstances, carry any portion of the bed or soil of the Potomac river, and contends that, by the terms of the Howsing grant, it is limited to the water line of the river, and that this contention is not affected by the words "including the several small creeks and inlets for the said quantity"; and on page 152 and page 155 of his brief, he criticises as crude, the plats or surveys representing the Howsing grant. To these statements, contentions and criticisms of the Counsel for the Appellee, for answer thereto, we simply refer to the following cases, decided by the Supreme Court of the United States, that seem clearly to hold the contrary of the Appellee's contention:

Newsom *vs.* Prior, 7th Wheaton, p. 8.

St. P. & Pac. R. R. *vs.* Shurmeier, 7th Wall., 272-290.

Lowndes *vs.* Town of Huntington, 153 U. S., 1-32.

Jeffries *vs.* Omaha Land Co., 134 U. S., 178.

Mitchell *vs.* Smale, 140 U. S., 406.

Hardin *vs.* Jordan, 140 U. S., 371.

The effort of Appellee's Counsel, on page 26 of his brief, to limit the effect of the terms employed in the Howsing grant "including several creeks or inlets for the said quantity," to things like Four Mile Run, is not justified by the record, for there is nothing shown on any plat in evidence to indicate there is any other bay or stream within the Howsing grant like Four Mile Run. Four Mile Run, alone, does not answer the inclusive terms of the grant as to several small creeks and inlets, etc. These terms embodied in the grant must be considered in construing the grant and it has been so held by the authorities cited in this reply.

Respectfully submitted,

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